

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	)	File Nos. SAT-LOA-19971222-00222
	)	SAT-LOA-20040322-
ATCONTACT Communications, LLC	)	00234/35/36/37
	)	SAT-MOD-20060511-
	)	00057/58/59/60
	)	SAT-AMD-20031030-00317
	)	SAT-AMD-20040719-00141
Petition for Reconsideration	)	SAT-AMD-20040322-00057
	)	SAT-AMD-20051118-00243
Motion For Stay	)	SAT-MOD-20070924-00130
	)	SAT-AMD-20071215-00176
	)	SAT-MOD-20070924-00132
	)	SAT-AMD-20080505-00100
	)	SAT-AMD-20080505-00096
	)	SAT-AMD-20080505-00099
	)	SAT-MOD-20080813-00155
	)	SAT-AMD-20080930-00195
	)	SAT-AMD-20080930-00194
)	
)	
	)	Call Signs: S2346, S2680, S2681, S2682,
	)	S2683

ORDER

Adopted: May 27, 2010

Released: June 3, 2010

By the Commission:

I. INTRODUCTION

1. By this Order, we deny ATCONTACT Communications, LLC's (AtContact's) Petition for Reconsideration of an August 21, 2009 Order by the International Bureau declaring AtContact's Ka-band satellite system authorization null and void.¹ AtContact has not demonstrated that, since it received authorization in 2006, it has made significant progress in building its satellite system – let alone that it has

¹ AtContact Communications, LLC, *Order*, DA 09-1850 (Int'l Bur., released Aug. 21, 2009) (*Cancellation Order*). AtContact Communications, LLC, Petition for Reconsideration of International Bureau Order DA 09-1850 (Sept. 21, 2009) (*Petition for Reconsideration*). AtContact filed both a public (redacted) Petition and an unredacted Petition, subject to a request for confidential treatment pursuant to 47 C.F.R. §§ 0.457 and 0.459. The Bureau has referred the Petition for Reconsideration to the Commission pursuant to 47 C.F.R. § 1.106(a)(1).

met the beginning physical construction milestone. AtContact has failed to persuade us that we should allow it to continue to hold scarce orbital resources indefinitely, to the exclusion of others, while it attempts to procure financing for the portion of its licensed system that it now seeks to build. We also deny AtContact's request to be released from its bond obligation. AtContact asks the Commission to "cancel its forfeiture instructions" to the surety.² An event of default described in the unambiguous language of the bond has occurred and the Commission, having properly triggered the conditions upon which a claim may be made, submitted a proper demand for payment of the full bond amount.³ Consequently, in accordance with the surety's obligation to pay under the bond, which does not depend on the outcome of any administrative or legal proceeding between AtContact and the Commission, the outstanding \$3 million balance on AtContact's bond is payable to the U.S. Treasury.⁴ In addition, because we deny AtContact's Petition for Reconsideration, we dismiss AtContact's Motion for Stay,⁵ which it filed contemporaneously with its Petition for Reconsideration, as moot.

II. BACKGROUND

2. ***AtContact's Satellite Authorization.*** On April 14, 2006, the International Bureau granted AtContact an authorization for a Fixed Satellite Service (FSS) system consisting of both geostationary satellite orbit (GSO) satellites and non-geostationary satellite orbit (NGSO) satellites.⁶ The authorization provided AtContact authority to construct, launch, and operate four GSO satellites and to construct three NGSO satellites.⁷

² *Petition for Reconsideration* at 21-22.

³ *Cancellation Order*; Letter to Safeco Insurance Company of America, from Mark Stephens, Chief Financial Officer (Aug. 26, 2009) (*Payment Demand*).

⁴ *See Ins. Co. of N. America v. United States*, 951 F.2d 1244, 1246 (Fed. Cir. 1991) ("surety's obligation to pay does not wait for completion of legal contests between the principal and the creditor").

⁵ AtContact Communications, LLC, Motion for Stay of International Bureau Order DA 09-1850. AtContact filed both a public (redacted) and a unredacted copy of the Motion, subject to a request for confidential treatment pursuant to 47 C.F.R. §§ 0.457 and 0.459.

⁶ *contactMEO Communications, LLC, Order and Authorization*, 21 FCC Rcd 4035 (Int'l Bur. 2006) (*License Order*). AtContact was authorized to construct three NGSO FSS satellites capable of operating in the 18.8-19.3 GHz and 28.6-29.1 GHz frequency bands on a primary basis, in the 29.5-30.0 GHz frequency band on a secondary basis, and in the 19.7-20.2 GHz frequency band on a non-conforming basis. AtContact also was authorized to construct, launch, and operate four GSO FSS satellites in the 28.6-29.1 GHz frequency band on a secondary basis, and in the 18.8-19.3 GHz frequency band on a non-conforming basis. (Space stations operating in primary services are protected against interference from stations of secondary services. Stations operating in a secondary service cannot cause harmful interference to or claim protection from harmful interference from stations of a primary service. Non-conforming services may be provided only on a non-harmful interference basis to any authorized service and may not claim interference protection from those services. *See* 47 C.F.R. §§ 2.104(d) and 2.105(c)). In June 2006, the licensee notified the Commission of its name change from contactMEO Communications, LLC to AtContact Communications, LLC. Letter to Marlene H. Dortch, Secretary, FCC, from James M. Talens, Counsel to AtContact Communications, LLC (June 5, 2006).

⁷ AtContact's authorization did not include launch and operating authority for its NGSO satellites because of questions regarding its disposal plans for the NGSO satellites. The authorization was conditioned on AtContact filing a modification application in May 2008 detailing its end-of-life disposal plans for its NGSO satellites. Once the modification application was evaluated, the Bureau would be in position to grant launch and operating authority for the NGSO satellites. AtContact filed for extension of time to file its plan. While the extension request was pending, AtContact filed a modification application changing its end-of-life plans from controlled re-entry to use of a disposal orbit. *See* File No. SAT-MOD-20080813-00155. Upon review, the Satellite Division determined that it needed greater detail concerning the rationale for AtContact's changing plans before it could address the revised plan. The Division stated it would defer action on AtContact's modification application and asked AtContact to file
(continued....)

3. As set forth in the Commission's rules, the Bureau required AtContact to adhere to a milestone schedule in implementing its licensed system. These milestones were incorporated as a condition of AtContact's authorization, which also provided that failure to comply with a milestone would result in automatic cancellation of the authorization.⁸ Because AtContact's system included both NGSO and GSO components, AtContact was required to comply with both the NGSO and GSO milestones in the Commission's rules.⁹ For both its NGSO and GSO satellites, AtContact was required to enter into a construction contract for the satellites within one year of grant, and to complete Critical Design Review (CDR) within two years of grant. In addition, AtContact was required to begin physical construction of the first NGSO satellite within two years, six months of grant; launch and operate the first NGSO satellite within three years, six months of grant; and bring all of the NGSO satellites into operation within six years of grant. AtContact was also required to begin physical construction of the four GSO satellites within three years of grant; and launch and operate the GSO satellites within five years of grant. Further, AtContact was required to post with the Commission a \$5 million bond within 30 days of grant. Section 25.165 of our rules provides the "licensee will be considered to be in default if it fails to meet any milestone deadline set forth in Section 25.164, and at the time of milestone deadline, the licensee has not provided a sufficient basis for extending the milestone."¹⁰ The agreement¹¹ among AtContact, the surety, and the United States contained specific conditions, including that the surety "tender . . . payment of the current outstanding maximum penal sum of the bond . . . within thirty (30) business days of . . . Notice of Default."¹² As we discuss below, the surety's obligation to pay matures on an event of default.

4. On July 6, 2007, the Bureau determined that AtContact had satisfied the first milestone for its NGSO and GSO satellites, by executing a satellite construction contract with Space Systems/Loral, Inc. (Loral).¹³ On September 5, 2008, the Bureau determined that AtContact had satisfied the second

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the additional information before April 30, 2009. See Letter to James M. Talens, Counsel for AtContact Communications, LLC from Robert G. Nelson, Chief, Satellite Division (Jan. 9, 2009) (*Orbital Debris Letter*). AtContact did not respond to this request but noted that it "would now appear to be moot" in light of its abandonment of plans to construct and launch its NGSO satellites. See Letter to Marlene H. Dortch, Secretary, FCC, from James M. Talens, Counsel for AtContact Communications, LLC (Feb. 6, 2009) (*AtContact February Letter*) at 2 n.3. See para. 8, below, for a complete discussion of the system modifications proposed in the *February Letter*.

⁸ License Order, 21 FCC Rcd at 4053 ¶¶ 48-49. See 47 C.F.R. § 25.161(a)(1).

⁹ 47 C.F.R. § 25.164(a), (b).

¹⁰ 47 C.F.R. § 25.165(c).

¹¹ See *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001).

¹² Federal Communications Commission Ka-band Satellite System License Payment Bond, Bond Number 6321647, dated May 12, 2006. The bond provides:

3. In the event of a Notice of Default (*i.e.*, an order or public notice revoking Principal's authorization) issued by the FCC to the Principal and the Surety regarding the performance of milestones specified above during the term of this bond, the Surety shall be liable only up to the current outstanding maximum penal sum amount after giving effect to applicable milestone reductions. It is also understood and conditionally agreed that upon receipt of such Notice of Default, the sole remedy under this bond will be the tender of payment of the current outstanding maximum penal sum of the bond . . . within thirty (30) business days of such Notice of Default.

* * *

5. If any conflict or inconsistency exists between the Surety's obligations or undertakings as described in this bond and as described in other documents, statutes or regulations, then the terms of this bond shall prevail.

¹³ Policy Branch Information, *Public Notice*, 22 FCC Rcd 11961 (2007).

milestone, by completing CDR for its NGSO and GSO satellites.¹⁴ Because the Bureau found that AtContact had met the first two milestones, AtContact was permitted to reduce the amount of its bond by 40 percent or \$2 million, to \$3 million.

5. The next milestone in AtContact's license required it to commence physical construction of its first NGSO satellite by October 15, 2008. To satisfy this milestone, licensees must provide sufficient information to demonstrate to a reasonable person that they have commenced physical construction of the licensed spacecraft.¹⁵ In this regard, licensees typically have submitted certifications that various components have been integrated into the satellite under construction. Licensees have also submitted photographs of satellite components that have been delivered to or made by the manufacturer, and are clearly identified for use with the licensed satellite. Licensees have also provided evidence that they have made all milestone payments to date under the manufacturing contracts.¹⁶ The burden of proof for this showing rests with the licensee.¹⁷

6. To demonstrate compliance with the beginning construction milestone, AtContact filed a certification from David M. Drucker, Manager of AtContact, stating that AtContact had commenced construction of its first NGSO satellite to the "best of my knowledge, information, and belief." AtContact also included an asset sales agreement it had entered into with a third party (not its satellite manufacturer) on October 14, 2008 for the purchase of traveling wave tube amplifiers (TWTAs). The first payment under the sales agreement was due January 15, 2009, and the first delivery of TWTAs was due around February 15, 2009.

7. Ordering long-lead items needed to begin construction of the spacecraft, such as TWTAs, provides evidence that a licensee has met the earlier CDR milestone.¹⁸ In AtContact's case, the CDR milestone occurred six months before the beginning construction milestone. Consequently, in a letter dated January 9, 2009, the Satellite Division informed AtContact that its showing was insufficient to demonstrate compliance with the beginning construction milestone. In the letter, the Division requested AtContact to "describe with specificity" the types of hardware (*e.g.*, propulsion hardware, satellite control hardware, satellite bus) in production, to describe the production that had taken place to date, and to provide photographic evidence of the current production of hardware.¹⁹ The Division also asked

¹⁴ Policy Branch Information, *Public Notice*, 23 FCC Rcd 13293 (2008).

¹⁵ Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10834, ¶ 193 (2003) (*Space Station Licensing Reform Order*).

¹⁶ See Policy Branch Information, *Public Notice*, Report No. SAT-00610, 24 FCC Rcd 7703 (2009) (finding that Intelsat LLC commenced physical construction of its satellite based on certifications that all payments under the contract had been made to date and photographs of the satellite under construction); Policy Branch Information, *Public Notice*, Report No. 07-00476, 22 FCC Rcd 18392 (2007) (finding that Loral Skynet Corporation commenced physical construction based on photographs showing propulsion equipment integrated with the satellite structure, and declarations from the spacecraft manufacturer that the manufacturing contract remained in effect, that all payments due had been made, and that 70 percent of the flight equipment was constructed); and Policy Branch Information, *Public Notice*, Report No. SAT-07-00469, 22 FCC Rcd 16284 (2007) (finding that Star One commenced physical construction based on declarations from Star One SA's Director of Engineering that 80 percent of payments due under the contract had been made and on photographs showing the satellite payload integrated into the satellite bus).

¹⁷ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10834, ¶ 193.

¹⁸ *Id.* at 10833, ¶ 191.

¹⁹ Letter to James M. Talens, Counsel for AtContact Communications, LLC from Robert G. Nelson, Chief, Satellite Division (dated Jan. 9, 2009) (*Milestone Showing Letter*).

AtContact to explain what payments had been made under the payment plan provided in the Loral construction contract – the contract that AtContact had previously submitted as certification that it had met its contract execution milestone.

8. In a February 6, 2009, response to the Bureau's letter, AtContact maintained that "the expenditure of millions of dollars on long-lead items such as traveling wave tube amplifiers as a first step in actual construction is more than sufficient" to demonstrate compliance with the beginning physical construction milestone.²⁰ It also submitted four unlabeled photographs as attachments to its letter: three showed TWTAs in plastic cartons, and one showed several stacked cardboard boxes with old tape marks and worn labels that were illegible.²¹ In addition, AtContact: (a) stated that it did not intend to proceed with its NGSO satellites and two of its GSO satellites, so it "surrendered the NGSO license"²² and was thereby "surrendering its slots [for two of the GSO satellites] contingent on permission to continue under its New Plan;"²³ (b) requested at least a three year extension of the remaining milestones for the two remaining GSO satellites;²⁴ and (c) asked the Bureau to act expeditiously on several pending modification applications relating to the remaining GSO space stations.²⁵ AtContact maintained that these revisions to its system were necessary due to its inability to obtain financing for its system as a result of the current economic climate.²⁶ AtContact also requested the release of its bond. AtContact's response did not address the Division's request for information regarding payments to Loral.²⁷

9. ***Cancellation of AtContact's Authorization.*** The Bureau found that AtContact did not meet the beginning physical construction milestone in its license. It found no evidence that AtContact had made any scheduled payments due to Loral under the manufacturing contract.²⁸ Further, it found no evidence that AtContact had purchased the TWTAs, that the TWTAs had been delivered to Loral for integration into the satellites, or that the TWTAs had even been approved by Loral.²⁹ Because AtContact did not satisfy this milestone, and did not request an extension of the milestone,³⁰ the license was null and void by its own terms. Consequently, the Bureau did not address AtContact's pending modification requests, its request for an indefinite extension of the remaining milestones, or its request to release the

²⁰ *AtContact February Letter* at 2.

²¹ *Id.* Attachment.

²² *Id.* at 2 and n.3.

²³ *Id.* at 5 n.7.

²⁴ *Id.* at 5.

²⁵ *Id.* at 2 n. 2.

²⁶ *Id.* at 3.

²⁷ On May 1, 2009, Intelsat North America LLC (Intelsat) filed a letter stating that granting such a broad waiver of the bond and milestone requirements could undermine the purpose of these obligations. Intelsat contended that AtContact failed to provide specific factual information to support a waiver, and disagreed with AtContact's claim that current economic conditions justify a waiver. Letter to Marlene H. Dortch, Secretary, FCC, from Kalpak S. Gude, Vice President and Deputy General Counsel, Intelsat North America LLC (May 1, 2009) (*Intelsat Letter*). In response, AtContact maintained that Intelsat's submission should be rejected because Intelsat had no standing in this matter. AtContact also stated that it previously provided "explanation, precedent, and justification" to the Commission to support its request. Letter to Marlene H. Dortch, Secretary, FCC, from James M. Talens, Counsel for AtContact Communications, LLC (May 8, 2009), at 2.

²⁸ *Cancellation Order* at ¶ 13.

²⁹ *Id.* at ¶¶ 13-14.

³⁰ 47 C.F.R. § 25.165(c); see also *License Order*, 21 FCC Rcd at 4053, ¶ 49.

bond. Rather, the Bureau dismissed these requests as moot.³¹ It also stated that the \$3 million bond was due to the U.S. Treasury.³²

10. On August 26, 2009, the Commission's Office of Managing Director (OMD) sent a letter to AtContact's bond surety, Safeco Insurance Company of America (Safeco), notifying it of the Notice of Default (*Cancellation Order*).³³ The *Payment Demand* included instructions for remitting the outstanding balance of the bond - \$3 million - to the U.S. Treasury. Safeco responded to the *Payment Demand* on September 3, 2009, stating that it had not heard from AtContact directly but was aware that AtContact was evaluating its options. Safeco requests the Commission to withdraw its claim or stay any demand for payment until AtContact exhausts its remedies.³⁴

11. ***Petition for Reconsideration.*** On September 21, 2009, AtContact filed a Petition for Reconsideration of the Bureau's *Cancellation Order*. AtContact asserts that it met the beginning construction milestone for its first NGSO satellite and provides additional evidence to support this assertion. AtContact also maintains that when licensing its system in 2006, the Bureau treated the "two system authorizations (NGSO and GSO) as separate."³⁵ As a result, AtContact argues that any issues regarding its NGSO milestone compliance should not affect its GSO satellite authorizations. Further, AtContact asserts that the Bureau improperly established a new – and higher – standard for determining whether a licensee has met the beginning construction milestone, which it applied for the first time in its review of AtContact's showing.³⁶ In addition, AtContact states that the public interest requires reconsideration of the *Cancellation Order* – noting its commitment to provide broadband via satellite to rural and underserved areas, and its applications for stimulus funding under the American Recovery and Reinvestment Act of 2009.³⁷ Finally, AtContact states that the Bureau should, at a minimum, reconsider its notice to the surety that the bond is due. AtContact states that the *Cancellation Order* did not reach the issue of AtContact's request for a waiver of the bond and urges the Bureau to consider this request at this time.³⁸

12. ***Motion for Stay.*** On September 21, 2009, AtContact also filed a Motion of Stay of the *Cancellation Order* and of OMD's *Payment Demand*. AtContact states it has satisfied the four criteria necessary for issuance of a Stay. AtContact maintains it will likely prevail on the merits – based on the assertions presented in its Petition for Reconsideration. AtContact also states that enforcement of the *Cancellation Order* and the *Payment Demand* threaten both its current service – providing Internet service through leased capacity on another satellite – and its plans to proceed with projects for which it has requested federal stimulus funding. In addition, AtContact claims grant of the Stay will not harm any other parties. AtContact concludes that granting the Stay would serve the public interest because its current customers rely on AtContact's service as their only source of broadband service and AtContact will not be able to move forward with proposed enhancements to this service if the Stay is denied.

³¹ *Cancellation Order* at ¶ 15.

³² *Id.*

³³ *Payment Demand*.

³⁴ Letter to Mark Stevens, FCC, from Bruce S. Echigoshima, Liberty Mutual (Sept. 3, 2009).

³⁵ *Petition for Reconsideration* at 2.

³⁶ *Id.* at 7.

³⁷ *Id.* at 16-17.

³⁸ *Id.* at 21.

III. DISCUSSION

A. Petition for Reconsideration

13. We first address AtContact's Petition for Reconsideration. Under the Commission's rules, a petition for reconsideration must "state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed."³⁹ In addition, new facts may be presented only if the facts relate to events that occurred or circumstances that changed since the last opportunity to present such matters; the facts were not known to the petitioner, and could not reasonably have been learned prior to such opportunity; or the public interest requires consideration of the facts.⁴⁰

14. AtContact has not demonstrated that the Bureau's finding that AtContact had not met the beginning construction milestone was in error. Indeed, the additional "evidence" presented by AtContact in its Petition provides further support for the Bureau's finding. In addition, AtContact has not demonstrated that, despite its failure to meet the milestone, the license should be reinstated or the bond released. Therefore, we deny the Petition.

1. Milestone Compliance

15. For more than two decades, the Commission has required licensees to adhere to milestone schedules. Milestones are intended to ensure that licensees provide service to the public in a timely manner and do not hold scarce orbital and spectrum resources to the exclusion of others.⁴¹ In the 2003 *Space Station Licensing Reform Order*, the Commission revised its licensing process for space station applications.⁴² As part of the new framework, the Commission adopted a package of safeguards designed to discourage speculative applications. The safeguards also help ensure that licensees remain committed and able to proceed with timely implementation of licensed space stations, which generally cost several hundred million dollars each to launch and operate.

16. As a result, all satellite authorizations include: (1) a requirement that licensees post a \$3 to \$5 million bond with the Commission within 30 days of license grant; and (2) a requirement to construct and launch the satellite(s) consistent with the milestone schedule specified in Section 25.164 of the Commission's rules.⁴³ The milestones track the three-to-five year period needed to construct and launch a satellite. The burden of proof for milestone compliance is on the licensee.⁴⁴ The amount of the bond may be reduced as milestones are met.⁴⁵ The licensee is considered to be in default if it fails to meet any milestone, and at the time of the milestone deadline, the licensee has not provided a sufficient basis for extending the milestone.⁴⁶ In those situations, the license becomes null and void and the outstanding

³⁹ 47 C.F.R. § 1.106(d).

⁴⁰ 47 C.F.R. § 1.106(c).

⁴¹ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10827, ¶ 173.

⁴² *Id.* at 10764, ¶ 1.

⁴³ The required bond is \$3 million for a geostationary-orbit (GSO) satellite and \$5 million for a constellation of non-geostationary-orbit (NGSO) satellites. Because AtContact's GSO space stations were to operate in the same frequency bands as its NGSO space stations, Commission rules require AtContact to post only one \$5 million bond. See 47 C.F.R. § 25.165(a)(3).

⁴⁴ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10833-34, ¶ 191-93.

⁴⁵ 47 C.F.R. § 25.165(d).

⁴⁶ 47 C.F.R. § 25.165(c).

balance of the bond is paid to the U.S. Treasury.⁴⁷ AtContact's license incorporated the Section 25.164 milestone schedule as a condition and provided, consistent with Section 25.161(a) of the Commission's rules, that "[f]ailure to comply with a milestone ... will result in automatic cancellation of [AtContact's] authorization."⁴⁸

a. New Evidence

17. In its *Petition*, AtContact submits what it claims to be new evidence to demonstrate that it met the beginning construction milestone. We find it is in the public interest to consider the new evidence.

18. **Cancelled checks.** AtContact provides copies of a number of cancelled checks in an attachment to its *Petition*.⁴⁹ Only one check is payable to Loral. This check is for an amount significantly less than the payment due to Loral at the time of contract execution, according to the payment schedule in the Loral construction contract.⁵⁰ Further, the beginning construction milestone occurred 18 months after contract execution. At this point in the construction process, many more payments were overdue to Loral under the terms of the contract. In short, AtContact has still not provided evidence that it fully made *any* scheduled payments to Loral pursuant to the manufacturing contract.

19. AtContact provides a copy of another check that it asserts provides "evidence of the first payment made under the TWTAs sales agreement."⁵¹ Even assuming that the check represents the first TWTAs payment, the check does not demonstrate AtContact met the beginning construction milestone. AtContact provides no evidence of additional payments under the TWTAs agreement. It instead acknowledges that further payments to the contractor have been delayed.⁵² AtContact also acknowledges that the TWTAs are still in the third-party contractor's possession.⁵³ Thus, it is clear that the TWTAs were *not* delivered to Loral for integration into the licensed NGSO spacecraft by the October 2008 beginning construction milestone, nor have they been delivered to date.⁵⁴ In any case, the record shows that this check does not represent the first installment required under the sales agreement. Rather, it is a

⁴⁷ 47 C.F.R. § 25.165; *Space Station Licensing Reform Order*, 18 FCC Rcd at 10824-25, ¶ 166-67; and *License Order*, 21 FCC Rcd at 4054, ¶ 53.

⁴⁸ *License Order*, 21 FCC Rcd at 4053, ¶ 49; 47 C.F.R. § 25.161(a).

⁴⁹ *Petition for Reconsideration*, Attachment 1 (confidential treatment requested).

⁵⁰ Regardless of whether the construction contract remains in effect, AtContact has presented no evidence that any progress in implementation has been made pursuant to the contract.

⁵¹ *Petition for Reconsideration* at 15.

⁵² *Id.*, Exhibit A, at 3. AtContact claims that the payments were delayed "largely due to regulatory uncertainties." *Id.* It is not clear what regulatory uncertainties existed in October 2008, when AtContact was required to meet the beginning construction milestone, or in the period through August 2009, when AtContact's license was cancelled. To the extent that AtContact may argue that its pending system modification requests, which it filed beginning in September 2007, created any "regulatory uncertainties," these were uncertainties of AtContact's own making. The Commission has held that a licensee's business decision to file a modification application does not justify a milestone extension. See, e.g., *Loral Spacecom Corp.*, *Memorandum Opinion and Order*, 20 FCC Rcd 12045, 12050, ¶ 14 (Int'l Bur. 2005); *NetSat 28 Company*, *Memorandum Opinion and Order*, 19 FCC Rcd 17722, 17726, ¶ 10 (Int'l Bur. 2004); *PanAmSat Licensee Corp.*, *Memorandum Opinion and Order*, 15 FCC Rcd 18720, 18723, ¶ 10 (Int'l Bur. 2000).

⁵³ *Petition for Reconsideration* at 15, Exhibit A, at 2, and Exhibit B (confidential treatment requested).

⁵⁴ While we need not revisit whether AtContact met its April 2008 CDR milestone, this check, together with the lack of evidence concerning payments to Loral, calls into question AtContact's compliance with this milestone.

deposit that could be *credited* toward the first installment and represents only one-seventh of the amount due in the first payment.⁵⁵

20. The payees of the remaining checks supplied in the Petition are largely illegible, but it is apparent that the checks were not written to Loral or to the third-party TWTAs contractor. AtContact fails to explain how these checks relate to the construction of the satellite. Further, the total amount of all the checks represents only a small fraction of the payments that should have been made 18 months into the construction contract, with several checks written for amounts less than \$100. Thus, the cancelled checks supplied by AtContact do not demonstrate that AtContact met its beginning construction milestone.

21. ***Declaration from Third Party Contractor.*** AtContact provides a declaration from an employee of the TWTAs contractor attesting to the “truth and accurate representations” of the photographs of the TWTAs.⁵⁶ The declaration states that the TWTAs are located in the third party’s facilities. It also states that the components “remain available to AtContact.”⁵⁷ This does not demonstrate that AtContact has met the beginning construction milestone. It indicates that the TWTAs are still in the third party’s possession, and have not been delivered to the manufacturer for integration into the satellite. As noted, ordering long-lead items such as TWTAs provides evidence that a licensee may have met the earlier CDR milestone. It does not provide evidence that a licensee has met the beginning construction milestone.

22. ***Declaration from Space Systems/Loral.*** In an effort to dispel any uncertainty that the TWTAs are linked to the manufacturing contract with Loral, AtContact submits a declaration from Loral’s Senior Vice President for Program Management and System Engineering.⁵⁸ According to AtContact, the declaration shows Loral is aware of the asset sales agreement, has tested the TWTAs and reached a favorable conclusion on their suitability for NGSO satellites, and is prepared to credit AtContact for the value of the TWTAs.⁵⁹ The declaration itself, however, does not support this characterization.⁶⁰ Nothing in the declaration indicates that Loral has committed to using the TWTAs in the satellites under construction. Indeed, in an affidavit attached as an exhibit to the application, AtContact acknowledges Loral has concluded only that the TWTAs “*may* be suitable for use in the ... downlink band range” in which the NGSO satellites were to operate.⁶¹

23. AtContact states that its proposed use of the TWTAs should be a “matter for applause, not castigation.”⁶² In determining that AtContact has failed to meet the beginning construction milestone, we are not passing judgment on AtContact’s proposed “creative recycling” of TWTAs initially built for another company – TWTAs that AtContact states “might have gone to the scrap heap if AtContact had not agreed to salvage them.”⁶³ Our determination is based solely on the fact that neither the declaration from Loral, nor the declaration from the TWTAs contractor, nor the single check to the TWTAs contractor

⁵⁵ *Petition for Reconsideration*, Attachment 4 at 2 (confidential treatment requested).

⁵⁶ *Petition for Reconsideration* at 15.

⁵⁷ *Id.*

⁵⁸ *Id.* at 14.

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* Exhibit D (confidential treatment requested).

⁶¹ *Id.*, Exhibit A at 2 (emphasis added).

⁶² *Id.* at 3, and Exhibit D (confidential treatment requested).

⁶³ *Id.* at 3.

in any way indicate that the TWTAs have been delivered to Loral for integration into the satellite AtContact certified was under construction.⁶⁴

b. Other Arguments

24. **Standard.** AtContact states that the Bureau improperly set a new, higher standard to ascertain whether a licensee has met the commencement of physical construction milestone. As noted, to satisfy the beginning construction milestone, licensees must provide sufficient information to demonstrate to a reasonable person that they have commenced physical construction of the licensed spacecraft.⁶⁵ AtContact maintains that, rather than applying the reasonable person standard to its case, the Bureau applied a standard that requires a licensee to have paid 25-50% of the total manufacturing contract to meet the milestone.⁶⁶ AtContact asserts that being “a quarter of the way there is not the same as starting” and that the new requirement is not consistent with common sense.⁶⁷ AtContact also states that it had no notice of the new requirement, and that applying the new requirement to AtContact was “improperly retroactive.”⁶⁸

25. The Bureau did not apply a new or higher standard in determining whether AtContact had satisfied its milestone requirement. AtContact seems to argue that licensees can meet the beginning physical construction milestone by starting *any* system implementation. This is not the case. The beginning construction milestone is the third milestone in each satellite licensee, and occurs at least two and one-half years after license grant.⁶⁹ Before this milestone, licensees are required to meet two other milestones – executing a binding contract and completing CDR for the licensed satellite(s).⁷⁰ Both of these milestones require the expenditure of funds and significant design work. For example, the Commission has stated that evidence of compliance with the CDR milestone may include evidence of a large payment of money required by most construction contracts at the time of CDR, and evidence that the licensee has ordered all long-lead items needed to begin physical construction of the spacecraft.⁷¹ Thus, contrary to AtContact’s contention, licensees should be well past the “starting” stage by the beginning physical construction milestone. Indeed, licensees, like AtContact, that have not made significant progress at this point in the implementation schedule will have difficulty meeting the launch and operation milestone that occurs, in the case of NGSO satellites such as AtContact’s, only one year later.

26. In evaluating AtContact’s compliance with the beginning physical construction milestone in the *Cancellation Order*, the Bureau discussed the type of information sufficient to demonstrate to a reasonable person that the beginning construction milestone was met, and cited several examples of adequate showings.⁷² The Bureau then stated ... “based on our experience in reviewing milestone compliance, at this point in the construction process licensees have generally paid 25-50 percent of the

⁶⁴ *Id.* at 3, and Exhibit D (confidential treatment requested).

⁶⁵ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10834, ¶ 193.

⁶⁶ *Petition for Reconsideration* at 8.

⁶⁷ *Id.* at 2, 8.

⁶⁸ *Id.* at 10.

⁶⁹ 47 C.F.R. § 25.164.

⁷⁰ *Id.*

⁷¹ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10833, ¶ 191.

⁷² *Cancellation Order* at ¶ 9.

total price in the manufacturing contract due to the cost of procuring parts.”⁷³ AtContact’s manufacturing contract with Loral shows a payment schedule typical in this respect. The Bureau did not create a new standard. It did not conclude AtContact failed to meet the milestone based solely on its expenditures under the contract. Instead, the Bureau based its decision on AtContact’s failure to submit any evidence documenting that parts had been delivered to the manufacturer for incorporation into the satellite. AtContact’s failure to provide evidence of payments to Loral commensurate with this stage of construction merely provided further support for the Bureau’s finding that AtContact had not demonstrated it had met the beginning construction milestone.

27. **Prior milestone determinations.** AtContact contends the Bureau’s decision that AtContact did not meet the beginning construction milestone is inconsistent with its treatment of another licensee – DigitalGlobe. Specifically, AtContact argues that the Bureau found DigitalGlobe had met its commencement of construction milestone based on a declaration from a company officer that the company had begun to procure long-lead equipment. AtContact further states that there was no evidence that DigitalGlobe paid 25 percent of its system price. AtContact claims that because it submitted the asset sales agreement and photographs of the TWTAs, it was better situated than Digital Globe and should have been treated similarly.⁷⁴

28. As most satellite licensees do when providing documentation to support milestone compliance, DigitalGlobe submitted both a public and confidential filing. The declaration from the DigitalGlobe company officer cited by AtContact was redacted from the public version. The information in the redacted declaration demonstrated that several long-lead items had been delivered to the manufacturer and integrated into the satellite.⁷⁵ Based on this, the Bureau concluded DigitalGlobe had met the beginning construction milestone. In contrast, AtContact has not provided evidence that *any* components were delivered to Loral for integration into the satellites purportedly under construction.

29. Thus, we affirm the Bureau’s finding that AtContact failed to commence physical construction of its first NGSO satellite. AtContact has had several opportunities to supply documentation that it had met the milestone -- in its initial milestone showing in October 2008, in response to the Bureau’s January 2009 letter, and in its Petition for Reconsideration of the *Cancellation Order*. Despite these opportunities, AtContact has not produced any documentation that it has met the milestone or, indeed, that it has made any significant progress in building the satellite system that it was authorized to build in 2006.

2. Other Arguments for Reinstating the License

30. AtContact argues in its Petition that even if it did not meet the beginning physical construction milestone, reconsideration of the *Cancellation Order* is warranted for other reasons. We discuss these below.

31. **The milestone is relevant only to the NGSO constellation.** AtContact states that the *Cancellation Order* is based on a failure to meet a milestone for its first NGSO satellite, and does not recognize the Bureau’s decision to “consider the NGSO and GSO portions of the [AtContact] applications separately.”⁷⁶ AtContact notes that, although it had requested the Bureau to treat its system as an NGSO

⁷³ *Id.*

⁷⁴ *Petition for Reconsideration* at 12-13.

⁷⁵ DigitalGlobe, Inc., IBFS File No. SAT-MOD-20040728-00151, Request for Determination of Compliance with Satellite Implementation Milestones (Oct. 2, 2006), at Attachment 3 (confidential treatment requested).

⁷⁶ *Petition for Reconsideration* at 4, citing *License Order*, 21 FCC Rcd at 4040, ¶ 12.

system in its initial applications, the Bureau stated in the *License Order* that it would not do so.⁷⁷ AtContact notes that the Bureau imposed separate milestone schedules to the NGSO and GSO satellites, assigned individual call signs for each of the GSO satellites, and required AtContact to pay separate application fees for each of the GSO satellites.⁷⁸ AtContact concludes that, therefore, compliance with the beginning construction milestone for the first NGSO satellite pertains to the NGSO authorization only. AtContact further states that the authorization for its GSO component remains viable and that the Commission should consider the modification requests and bond waiver related to the GSO component.

32. In the *License Order*, the Bureau treated the NGSO and GSO components separately for *processing* purposes only. The Bureau noted that the operations of GSO and NGSO satellites are inherently different and that the Commission's rules contain separate technical requirements and licensing frameworks for each type of satellite.⁷⁹ Consequently, the Bureau stated that it would not treat AtContact's proposed system as an "NGSO system," as AtContact had requested, and that it would consider each component separately. Further, the Bureau generally assigns individual call signs to each GSO satellite because each application must be considered individually based on each GSO satellite's unique technical characteristics and proposed orbital location. Individual call signs also allow the Bureau to track the individual satellites as a system is implemented, and, as often occurs, changes are made to individual satellites.⁸⁰ In addition, the Commission's rules require application fees "per satellite" for GSO satellites.⁸¹ Finally, the Commission's rules contain separate milestone schedules for NGSO and GSO satellites.⁸²

33. None of these factors indicates that the *License Order* contained two separate authorizations. To the contrary, in granting AtContact's applications, the Bureau stated that it was granting AtContact "authority for a satellite *system* consisting of three [NGSO] and four [GSO] satellites."⁸³ Further, in setting out the milestone schedules for both the NGSO and GSO components, the Bureau stated that "[f]ailure to comply with a milestone...will result in automatic cancellation of [AtContact's] *authorization* with no further action on the Commission's part."⁸⁴ Indeed, AtContact paid one bond for one hybrid system consisting of GSO and NGSO components, rather than a bond for each individual GSO satellite and a bond for the NGSO constellation.⁸⁵ Separate bond payments for each of AtContact's four GSO satellites and its NGSO system would have totaled \$17 million, rather than the \$5 million AtContact submitted. The Bureau's treatment of AtContact's system is consistent with its

⁷⁷ *License Order*, 21 FCC Rcd at 4040, ¶ 12.

⁷⁸ *Petition for Reconsideration* at 4.

⁷⁹ *License Order*, 21 FCC Rcd at 4040, ¶ 12. See also 47 C.F.R. §§ 25.157, 25.158, and 25.164(a) and (b).

⁸⁰ As noted, AtContact had filed several modification applications relating to individual GSO satellites.

⁸¹ The Commission is statutorily required to assess and collect application fees in accordance with the Schedule of Fees prescribed by Congress. 47 U.S.C. § 158; and 47 C.F.R. § 1.1107.

⁸² 47 C.F.R. § 25.164.

⁸³ *License Order*, 21 FCC Rcd at 4035, ¶ 1 (emphasis added).

⁸⁴ *License Order*, 21 FCC Rcd at 4053, ¶ 49 (emphasis added). See also ¶ 68 ("[AtContact's] authorization shall be null and void" for failure to meet a milestone). AtContact acknowledges that the *License Order* states that the "authorization" would become null and void for failure to meet a milestone. AtContact then asks "[b]ut which authorization was intended to apply to which milestone dates and to which call sign?" and states that the answer makes sense only "if the milestone schedules and associated bifurcated authorizations are viewed as separate." Petition at 5. To the contrary, the plain language of the *License Order* indicates that there was only one authorization and that this authorization would become null and void if a milestone was missed.

⁸⁵ *License Order*, 21 FCC Rcd at 4054, ¶ 57.

treatment of other NGSO/GSO systems.⁸⁶ Therefore, by its own terms, AtContact's failure to meet the beginning physical construction milestone rendered the authorization for AtContact's entire authorized system null and void.

34. **Section 25.159(d).** AtContact maintains that Section 25.159(d) of the Commission's rules allows a licensee "three strikes" at missing a milestone before a license is revoked.⁸⁷ AtContact contends that even if it missed one milestone, this constitutes only "one strike." Section 25.159(d) in no way suggests this.⁸⁸ Section 25.159(d) pertains to applicants who have an established pattern of missing milestones.⁸⁹ Specifically, the rule provides that if a licensee misses three milestones within a three-year period, there is a presumption that the licensee obtained one or more of those licenses for speculative purposes.⁹⁰ Until the licensee rebuts the presumption, it is precluded from filing an additional application in certain circumstances. Section 25.159(d) has nothing to do with a license becoming null and void by its own terms when a licensee has missed a milestone.

35. **Broadband Considerations.** Based on Congress' and the Commission's recently articulated goals to expand broadband services, AtContact argues that cancelling its satellite authorization is contrary to the public interest.⁹¹ AtContact states that it intends to provide satellite broadband services to Alaska, Hawaii, and other underserved or unserved areas of the United States. AtContact states that in furtherance of this goal, it applied for stimulus funding under the American Recovery and Reinvestment Act of 2009, and maintains that the Bureau must take this into account in evaluating AtContact's petition.⁹² AtContact further states that the Bureau must consider AtContact's current customers – for which it provides Internet service via leased satellite capacity. According to AtContact, cancelling its authorization eliminates its customers' hopes for enhanced broadband services.⁹³ Finally, AtContact asserts that reinstating its license will not undermine the Commission's milestone policy.⁹⁴

36. We recognize that promoting broadband services to rural areas is an important policy goal. Nevertheless, we cannot reinstate AtContact's license based on its pending applications for federal funds.⁹⁵ There is no assurance that these applications will be approved. We note that other satellite providers have also applied for stimulus funding.⁹⁶ Further, even assuming AtContact's applications are

⁸⁶ See *Globalstar, L.P., Memorandum Opinion and Order*, 18 FCC Rcd 1249 (Int'l Bur. 2003), *aff'd* 19 FCC Rcd 11548 (2004) (licensee's entering into a construction contract for one GSO satellite not sufficient to meet construction contract milestone for its NGSO/GSO 2 GHz system and license cancelled).

⁸⁷ *Petition for Reconsideration* at 7.

⁸⁸ 47 C.F.R. § 25.159(d).

⁸⁹ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10836, ¶ 200.

⁹⁰ See, e.g., Letter to Pantelis Michalopoulos, Counsel for EchoStar Corporation, from Robert Nelson, Chief Satellite Division, DA 09-1149 (May 27, 2009).

⁹¹ *Petition for Reconsideration* at 16.

⁹² *Id.*

⁹³ *Id.* at 19.

⁹⁴ *Id.* at 21.

⁹⁵ See *Constellation Communications Holdings, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 18822, 18829, ¶ 16 (2003) (milestone compliance is not excused because of poor market conditions); *Netsat 28 Company, L.L.C., Memorandum Opinion and Order*, 19 FCC Rcd 17722, 17727, ¶ 14 (Int'l Bur. 2004) (efforts to raise financing in an unfavorable business climate does not justify an extension or waiver of a milestone).

⁹⁶ See, e.g., *Communications Daily*, Oct. 2, 2009, at 12 (WildBlue and ViaSat have applied separately for federal money to expand the reach of broadband to rural areas).

approved, and assuming that the Bureau had issued separate authorizations for AtContact's GSO and NGSO satellites, there is no assurance that AtContact will be in a position to construct and launch two GSO satellites. The possibility of AtContact ultimately building and launching the satellites does not outweigh the Commission's stated public interest goal of ensuring that licensees build their satellite systems in a timely manner and that valuable orbit spectrum is not held by licensees unable to proceed with their plans to the exclusion of other potential providers. The Bureau has found that new entrants and the innovative services they promise are of little value if the proposed services are not predictably and promptly offered.⁹⁷ In fact, because AtContact requested at least a 36 month extension of the remaining milestones for the two GSO satellites it states it intends to build, its proposed services would not be available before 2014, at the earliest.⁹⁸

37. We reject AtContact's claim that allowing it to retain the authorization for two GSO satellites while it attempts to obtain stimulus funding would not undermine the Commission's milestone policy. The milestone policy is designed both to ensure that the satellite licensee is committed to *completing* its system in a timely fashion and to prevent licensees from holding scarce orbital and spectrum resources to the exclusion of others. AtContact maintains that because its GSO satellites are only authorized to operate on a secondary/non-interference basis in spectrum designated for primary NGSO operations, it is not precluding other NGSO operators from operating in the bands.⁹⁹ We acknowledge that allowing AtContact to continue to hold two GSO authorizations on a secondary/non-interference basis may not affect future NGSO systems. However, it *will* impact our ability to authorize other GSO systems in these frequency bands. Two GSO satellites providing service to the same coverage areas in the same frequency bands cannot operate at the same orbital location without causing unacceptable interference into the other system's operations. Consequently, we cannot authorize two GSO operators to operate at the same orbital location – even if those operations are authorized on a secondary/non-interference basis to primary NGSO systems.¹⁰⁰ Thus, allowing AtContact to hold a license would preclude us from authorizing another GSO satellite at an orbital location assigned to AtContact.¹⁰¹

38. Further, AtContact requests at least a three year extension of the remaining milestones for the two GSO satellite authorizations it has not surrendered. Reinstating AtContact's authorization for these two satellites, together with granting its milestone extension request, would allow it to hold space

⁹⁷ See, e.g., *NetSat 28 Company, L.L.C.*, 19 FCC Rcd at 17728, ¶ 16 (milestone not waived because a proposed service is more beneficial than services that might be provided by another satellite operator); *Astrovision International, Inc., Order*, 22 FCC Rcd 2379, 2383, ¶ 14 (Int'l Bur. 2007) (permitting Astrovision to delay implementation of its system based on the uniqueness of its system would allow it to encumber spectrum to the exclusion of other applicants seeking to implement their own unique systems).

⁹⁸ *AtContact February Letter* at 5 and 8.

⁹⁹ *Petition for Reconsideration* at 21.

¹⁰⁰ We note that EchoStar Satellite Corporation has filed a petition for rulemaking to upgrade the status of GSO satellites in these bands to co-primary. EchoStar Satellite Corporation, *Petition for Rulemaking to Redesignate the Non-Geostationary Fixed-Satellite Service Bands to Allow Geostationary Fixed-Satellite Service Operations on a Co-Primary basis*, RM 10767.

¹⁰¹ As AtContact acknowledges, at the time it filed its application, there was already one other GSO satellite authorized to provide service on a secondary/non-interference basis in the Ka-band NGSO-primary frequency bands. See *ViaSat, Inc.*, Application File No. SAT-AMD-20080623-00131 (grant stamp authorization dated August 18, 2009 allowing U.S. service from a satellite authorized by the Isle of Man at the 115.1° W.L. orbital location). See also *ViaSat Inc.*, Application File No. SAT-MOD-20091127-00129 (grant stamp authorization dated April 20, 2010, to construct, launch, and operate a GSO Ka-band satellite that will operate on a secondary/non-interference basis at the 77.3° W.L. orbital location). See para. 54 below, for a discussion regarding the unique characteristics of each orbital location.

station licenses for at least three additional years, with no assurance that it will ever be able to implement its plans. Despite AtContact's arguments to the contrary, this would undermine the Commission's milestone policy.

3. Request for Bond Release

39. AtContact states that, regardless of whether we reinstate the license, the Commission should "give serious consideration to [its] previously filed request for a waiver of its bond requirements" and release it from its bond obligations.¹⁰² AtContact argues that the underlying purpose of the bond requirement would not be served by compelling payment in light of the difficulties in raising financing during the "unprecedented national economic crisis,"¹⁰³ its investment of "substantial sums into its proposed satellite operations, including the purchase of the bond in question,"¹⁰⁴ its "*bona fide* intent to provide a full-fledged satellite service to the public,"¹⁰⁵ and the negative impact cancellation would have on its "current broadband operations."¹⁰⁶ AtContact also states that a release in this case is consistent with Commission precedent, citing *Rainbow DBS Company, LLC*.¹⁰⁷

40. We reject AtContact's request to be released from its bond. In requesting a release of the bond, AtContact is asking the Commission to waive the bond requirement set forth in Section 25.165.¹⁰⁸ As discussed below, waiver of the bond would be fundamentally inconsistent with the underlying purpose of the bond requirement, and would disserve the public interest. Indeed, another satellite licensee, Intelsat North America LLC, filed a response to AtContact's February 9, 2009, letter stating that granting such a broad waiver of the bond and milestone requirements could undermine the purpose of these obligations.¹⁰⁹ Further, under the plain and unambiguous terms of the suretyship agreement among Safeco, AtContact, and the United States, Safeco was obligated to tender the amount due within 30 business days of the Notice of Default. AtContact's request for a waiver does not alter that requirement.

41. We are authorized to grant a waiver under Section 1.3 of the Commission's rules if the petitioner demonstrates good cause for such action.¹¹⁰ Good cause, in turn, may be found and a waiver granted "where particular facts would make strict compliance inconsistent with the public interest."¹¹¹ To

¹⁰² *Petition for Reconsideration* at 22.

¹⁰³ *Id.* at 22.

¹⁰⁴ *Id.* at 24.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Petition for Reconsideration* at 22, citing *Rainbow DBS Company, LLC, Memorandum Opinion and Order*, 22 FCC Rcd 4272 (2007) (*Rainbow*).

¹⁰⁸ 47 C.F.R. § 25.165. Granting a waiver would either release a licensee from any payment obligation under the bond or require the return of any bond monies paid.

¹⁰⁹ *Intelsat Letter*.

¹¹⁰ 47 C.F.R. § 1.3. See also *ICO Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264 (2005); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹¹¹ *Northeast Cellular*, 897 F.2d at 1166; *ICO Global Communications*, 428 F.3d at 269 (quoting *Northeast Cellular*); see also *WAIT Radio*, 418 F.2d at 1157-59.

make this public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.¹¹²

42. The bond requirement was adopted as part of a comprehensive satellite licensing reform.¹¹³ The bond is intended to discourage speculative applicants from applying for satellite licenses. In the *Bond Order*, the Commission stated:

To the extent petitioners are asserting that satellite entrepreneurs should be free to apply for and obtain satellite licenses and later abandon their licenses because of economic changes in the marketplace, we believe that such practices are inconsistent with the public interest. We realize that licensees may file applications with the Commission fully intending to construct their satellites, and then face changes in economic conditions that lead them to alter their business plans. Nonetheless, such changes in a licensee's plans and the resulting delays in construction and provision of service would preclude some other interested company from constructing a satellite in a more timely fashion. Therefore, we conclude that we must maintain the bond requirement, to create incentives for companies to consider their business risks before applying for a license. Furthermore, regardless of its intent, the actions of a licensee who obtains a license and surrenders it later have the same effect as the actions of a licensee who warehouses scarce orbit and spectrum resources. The bond requirement was designed to prevent such valuable resources from lying fallow when another party might be able to put those resources into use.¹¹⁴

43. AtContact has not shown good cause for granting a waiver. On October 14, 2008 - one day before it had to meet its construction commencement milestone for its NGSO satellite - AtContact submitted a filing to the International Bureau in which it claimed the company had commenced construction of its first NGSO satellite. Then, on February 6, 2009, after the Bureau had requested more proof of construction of this NGSO satellite, AtContact informed the Bureau it no longer wanted the NGSO satellite licenses. AtContact's decision to relinquish its NGSO licenses rather than providing proof of compliance with the construction milestone casts considerable doubt on the credibility of its earlier October 2008 statement that it had commenced construction of an NGSO satellite. These circumstances put AtContact in a poor posture to request a waiver from the bond forfeiture requirement, which is intended to ensure that licensees are fully committed to the construction of satellite facilities.

44. In addition, AtContact's argument that it has already invested substantial sums into its licensed satellite system is unsupported by the record. As noted, each GSO satellite and each NGSO constellation generally cost at least several hundred million dollars to construct and launch. The documented payments for AtContact's licensed three NGSO/four GSO system are significantly less than the relatively small portion of total payments that were required prior to the earlier CDR milestone. Further, the purchase of a bond in connection with licensing does not demonstrate investment of any funds towards satellite construction. In fact, accepting payment of the bond as a factor favoring waiver would undermine the bond requirement.

¹¹² See, e.g., *WAIT Radio*, 418 F.2d at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant's proposal does not undermine the public interest policy served by the rule); *Northeast Cellular*, 897 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).

¹¹³ Amendment of the Commission's Space Station Licensing Rules and Policies, *First Order on Reconsideration and Fifth Report and Order*, 19 FCC Rcd 12637, ¶ 1 (2004) (*Bond Order*).

¹¹⁴ *Id.* at 12652, ¶ 37.

45. AtContact relies on expenditures in connection with its separate provision of broadband service using leased capacity on operating satellites, and its participation in other ventures, as support for the waiver.¹¹⁵ The bond requirement, however, does not distinguish between incumbent service providers and new entrants. We see no policy justification for granting more favorable treatment to persons with prior entrepreneurial experience in the satellite industry. In fact, concerns with speculation are also present in the case of individuals who have interests in other satellite ventures. Operators with other satellite interests may have a strategic interest in foreclosing use of key spectrum resources by applying for and holding licenses to the exclusion of potential competitors. AtContact's expenditures with respect to other facilities - not covered by the bond - do not prevent its GSO orbital locations from lying fallow when another party might be able to put those resources into use. Therefore, granting AtContact a waiver based upon its other ventures would undermine the purpose of the bond.

46. At Contact also claims that its pending applications for federal funding demonstrate that it is not speculating or warehousing spectrum.¹¹⁶ This argument is unpersuasive. More than three years after grant of its authorization and after a point where substantial expenditures should already have occurred, AtContact has applied for but has not been awarded federal funds that, by its own account, are critical if construction of a much scaled-back satellite system is to proceed. Regardless of whether AtContact intended to speculate or warehouse, its lack of progress and the contingent nature of its possible future financing represent precisely the type of situation the bond requirement is intended to address. As the Commission indicated in adopting the bond requirement, the actions of a licensee who obtains a license and surrenders it later, regardless of its intent, have the same effect as the actions of a licensee who intentionally warehouses spectrum.¹¹⁷ We therefore decline to consider AtContact's filing of an application for federal funds as evidence weighing in favor of waiving the bond.

47. AtContact contends that a waiver is justified under the principles of the *Rainbow* case. In *Rainbow*, the Commission waived the bond requirement and released Rainbow's bond obligations. Rainbow held licenses for five Ka-Band satellites. In applying for these licenses, Rainbow indicated that it planned to use the satellites in conjunction with its existing direct broadcast satellite (DBS) service operations and a related high definition programming service. After obtaining bonds and signing binding construction contracts for all five Ka-band satellites, Rainbow surrendered all five licenses and asked for a release from its bond obligations. In surrendering the licenses, Rainbow stated that because it had decided to discontinue its other services, it no longer needed its Ka-band satellite authorizations. The Commission analyzed Rainbow's request in light of what it described as the three goals of the bond requirement—ensuring the licensee's financial ability to establish the licensed service, ensuring its good faith intent to provide the service, and discouraging the warehousing or speculative pursuit of scarce spectrum.

48. The Commission noted that Rainbow and its affiliated companies invested approximately \$1 billion over a six-year period to launch a state-of-the-art DBS satellite, develop consumer equipment, construct uplink facilities, and create and acquire innovative, high definition programming.¹¹⁸ The Commission concluded that it was "clear that using the bond requirement to weed out an entity with Rainbow's financial resources would not serve the purposes of the rule with respect to financial qualifications."¹¹⁹ The Commission also noted that, in addition to the \$1 billion, Rainbow invested more than \$13 million directly to develop and construct the five Ka-band satellites, including \$12 million paid

¹¹⁵ *Petition for Reconsideration* at 19-20, 24.

¹¹⁶ *Id.* at 24.

¹¹⁷ *Bond Order*, 19 FCC Rcd at 12652, ¶ 37.

¹¹⁸ *Rainbow*, 22 FCC Rcd at 4275, ¶ 9.

¹¹⁹ *Id.*

under the construction contract for the satellites.¹²⁰ The Commission concluded that this was sufficient to support a conclusion “that Rainbow’s ultimate inability to proceed with its system was not caused by insufficient good faith efforts to succeed, but rather because of a lack of subscribers to sustain the enterprise over the long term.”¹²¹ Finally, the Commission concluded that because there were other Ka-Band orbital locations available for other parties, there was no concern with warehousing.¹²²

49. We cannot conclude that *Rainbow* supports granting AtContact’s request for a waiver. True, AtContact invokes generally the same type of evidence as was presented in the *Rainbow* case. Like *Rainbow*, AtContact cites its participation in other related satellite ventures, its expenditures in connection with the licensed system, and an allegation that it is not precluding other potential satellite providers in these frequency bands. AtContact’s asserted expenditures for its licensed and related satellite ventures, though, are only a small fraction of the large amount *Rainbow* expended, which was critical to approval of that waiver application.

50. This case, moreover, gives us an opportunity to revisit the waiver framework articulated and applied in *Rainbow*, as the satellite market has further matured and we are faced with many similar bond waiver requests that invoke the *Rainbow* decision.¹²³ Indeed, given this growing number of bond waiver requests and the danger that the *Rainbow* approach may provide licensees with a means for circumventing the purpose and goals of the bond requirement established in the *Space Station Licensing Reform Order*, we are examining more closely whether the premises of this approach are fully consistent with the bases of our action in the *Reform Order*. As discussed below, we have determined that they are not.

51. *Rainbow* was premised on a conclusion that the purpose of the bond was to ensure the licensee’s financial ability to establish the licensed service.¹²⁴ *Rainbow*’s reasoning, however, has created a tension with the Commission’s rationale for eliminating the financial qualification requirement and replacing it with a bond requirement in the *Space Station Licensing Reform Order*. Prior to adopting licensing reform, the Commission required an applicant to demonstrate that it had sufficient funds to cover the construction, launch, and first year operating costs of the proposed satellite. In the *Space Station Licensing Reform Order*, the Commission determined that a licensee’s financial ability did not accurately reflect whether a licensee would proceed with construction and launch of its space station; experience had shown that many financially qualified licensees had chosen not to go forward with system implementation.¹²⁵ In adopting the bond requirement, the Commission found that requiring a surety company to assess the risk that a licensee would default on a bond would provide a more accurate,

¹²⁰ *Id.* at 4275, ¶ 10.

¹²¹ *Id.*

¹²² *Id.* at 4276, ¶ 11.

¹²³ Currently, the Bureau has six requests for waivers of the bond requirement in addition to AtContact’s: EchoStar Satellite Operating Corporation, Withdrawal of Authorization at 117° W.L. and Request for Waiver, Call Sign S2490, (December 8, 2006); EchoStar Satellite Operating Corporation, Surrender of Authorizations at 109° W.L. and 121° W.L. and request for waivers of the bond for each authorization, Call Signs S2607 and S2609 (October 1, 2007); EchoStar Corporation, Withdrawal of Authorization and Request for Waiver, for 97° W.L. orbital location, Call Sign S2499 (March 9, 2009); EchoStar Corporation, Withdrawal of Authorization and Request for Waiver for 113° W.L., Call Sign S2636 (Sept. 2, 2009); MSV International, LLC, Surrender of Authorization and Request for Withdrawal and Release of Performance Bond, Call Sign S2487 (June 12, 2006). Several of these requests, to varying degrees, rely upon the *Rainbow* decision to support their requests for waivers.

¹²⁴ *Rainbow*, 22 FCC Rcd at 4274, ¶ 6.

¹²⁵ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10824, ¶ 164.

market-driven determination of a licensee's ability and willingness to proceed than would a regulatory determination.¹²⁶

52. *Rainbow* also stated that expenditures made in connection with a related enterprise, even though not directly targeted for construction of the licensed facilities for which the bond was obtained, demonstrate an applicant's "financial abilities."¹²⁷ As a matter of policy, though, the consideration of expenditures in related ventures may unduly favor established satellite entrepreneurs – who are likely to be able to provide such evidence – over new entrants. We have come to believe that the intent of the bond requirement is best met by focusing only on the financial arrangements and expenditures made in connection with the facilities for which the bond was acquired.

53. We have further come to conclude that *Rainbow*'s reliance on the applicant's "good faith efforts to succeed" and the lack of evidence that the license was procured "merely for the sake of speculation" will tend to undermine the bond requirement, which was designed to obviate subjective assessments of the licensee's motives.¹²⁸ By limiting reliance on subjective judgments and providing concrete incentives for construction like the bond requirement, we not only reduce the risks of error associated with such judgments, but we avoid creating counterproductive incentives that could motivate the licensee to build a record of good intentions at the expense of concrete actions that will favor timely construction and avoid negative repercussions like bond revocation. As the Commission indicated in adopting the requirement, an applicant who obtains a license but is not able to proceed disserves the public interest in the same way as a licensee who obtains a license for speculative or warehousing purposes.¹²⁹ Further, protracted adjudication of issues related to motives – as opposed to the accomplishment of objective milestones toward constructing the system – has the potential for delaying release of spectrum for other potential uses.

54. In giving weight to the existence of "feasible [spectrum] alternatives" as a factor for determining whether a bond should be released, *Rainbow* treated orbital locations as fungible. Each, however, has unique characteristics. Applicants apply for locations that have optimal characteristics for the intended purpose.¹³⁰ Award of a license denies the opportunity for other companies to exploit these characteristics. Our recent experience has shown that when licenses are cancelled and orbital locations are made available for reassignment, other parties often quickly apply for those locations – even when other orbital locations in that frequency band are available.¹³¹ Further, requiring the Commission to determine whether there are "feasible alternatives" involves the Commission in evaluating applicants' business plans and may require the substitution of the Commission's judgment for that of the applicant.

55. The safeguards against speculation adopted in the *Space Station Licensing Reform Order*, including milestone and bond requirements, are designed to discourage speculative applications

¹²⁶ *Id.* at 10825, ¶ 167.

¹²⁷ *Rainbow*, 22 FCC Rcd at 4275, ¶ 9.

¹²⁸ *Id.* at 4275, ¶ 10.

¹²⁹ *Bond Order*, 19 FCC Rcd at 12652, ¶ 37.

¹³⁰ For example, AtContact had applied for orbital relocations for two of its GSO satellites.

¹³¹ For example, ViaSat, Inc. filed for authority to use Ka-band frequencies at 77° W.L. shortly after the Commission announced *Rainbow*'s authorization at this location was null and void. ViaSat, Inc., SAT-LOA-20070314-00051. In addition, EchoStar Corporation and PanAmSat Corporation both filed applications to use Ka-band frequencies at the 85° W.L. orbital location within minutes of the orbital location becoming available for assignment. EchoStar Corporation, IBFS File No. SAT-LOA-20080523-00112, and PanAmSat Licensee Corp., IBFS File No. SAT-MOD-20080523-00113). In contrast, the 71° W.L. and 73° W.L. orbital locations, among others, remain available for assignment to Ka-band satellites.

and ensure that scarce orbital spectrum resources are held only by those willing and able to proceed with their plans. For the reasons explained above, and given our additional experience with the passage of time, we now believe that the waiver framework employed in the *Rainbow* decision cannot be generally employed without compromising the integrity of these reforms. Allowing entities to file applications, with the knowledge that they may well be able to obtain a waiver of the bond if they are unable to proceed with implementation, could eviscerate the Commission's safeguards against speculation and warehousing. Accordingly, we conclude that the approach that will most effectively further the goals of the bond requirement in the satellite implementation context is one based directly on the standard enunciated in *WAIT Radio*, as explained herein.¹³² To the extent that the *Rainbow* decision suggests otherwise, it is hereby overruled.

56. Finally, we note that the *Rainbow* case could not in any event, provide AtContact with any equitable basis for arguing that it should be released from its bond obligation. The facts of this case demonstrate that AtContact could not have (and did not) rely upon *Rainbow* to its detriment. AtContact received the satellite authorizations at issue here in 2006, before the Commission's 2007 decision in *Rainbow*. Therefore, AtContact cannot claim that it acquired the authorizations based upon a reasonable expectation that it could later fail to meet a construction milestone without penalty of a bond forfeiture. AtContact did not rely upon *Rainbow* when, in October 2008, it claimed it had commenced construction of its first NGSO satellite. In its February 2009 letter, At Contact, for the first time, informed the Commission it would forego all three of its NGSO satellites and two of its GSO satellites and also asked for waiver of its bond obligation. However, it did not indicate that it had relied on *Rainbow* in making any of its license construction decisions, including its decision not to proceed with its system as licensed. Therefore, any argument that AtContact relied on *Rainbow* in deciding not to meet the milestones would not be supported by the record.

B. Motion for Stay

57. In its Motion for Stay, AtContact asks the Bureau to stay the *Cancellation Order* and the related action by the Commission directing the surety to remit the funds due under the bond to the U.S. Treasury until resolution of its Petition for Reconsideration. In this case, however, Safeco's obligation under the bond to pay to the U.S. Treasury the amount of bond became fixed upon receipt of the Notice of Default.¹³³ The clear and unambiguous language of the agreement does not give way to AtContact's request for a stay.¹³⁴ Therefore, Safeco's obligation in this instance is not deferred by the filing and completion of legal contests, whether in the form of an administrative petition for reconsideration or a lawsuit filed. The United States need not seek recourse in another forum (either in this proceeding or in court) to demand and obtain from Safeco payment of the obligation that matured on the date it was notified. Indeed, to ensure that the government is properly compensated, prejudgment interest may accrue from that date until the amount is paid.¹³⁵ The United States, through the Commission's effort, seeks no more than what is due under the terms of the agreement. We need not amplify in this Order the proper and complete demand for payment presented under the terms of the bond. Because we have addressed the merits of AtContact's Petition, the Motion for Stay is now moot.

¹³² *WAIT Radio*, 418 F.2d at 1157-59.

¹³³ See *United States v. United States Fidelity & Guar. Co.*, 236 U.S. 512, 524 (1915).

¹³⁴ See *Ins. Co. of N. America v. United States*, 951 F.2d 1244, 1246 (Fed. Cir. 1991) ("The surety's obligation to pay does not wait for completion of legal contests between the principal and the creditor. . . . The Government also bargained for someone to pay the bond amount, when due, without the need for recourse to the courts.").

¹³⁵ See *United States v. United States Fidelity & Guar. Co.*, 236 U.S. at 530; *Ins. Co. of N. America v. United States*, 951 F.2d at 1246 ("if a surety delays payment beyond proper notification of liability, interest accrues on the debt").

IV. ORDERING CLAUSES

58. For the forgoing reasons, IT IS ORDERED that ATCONTACT Communications, LLC Petition for Reconsideration of International Bureau Order DA 09-1850 is DENIED.

59. IT IS FURTHER ORDERED, that ATCONTACT Communications, LLC's Motion for Stay of International Bureau Order DA 09-1850 is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary